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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
RESPONSE TO STATE'S BENCH
MEMORANDUM RE: ADMISSIBILITY
OF EVIDENCE RELATING TO LESSER
INCLUDED OFFENSE**

I. INTRODUCTION

The State asks this Court to "reconsider its previous ruling" that "evidence that is only relevant to the lesser-included offense of negligent homicide may not be admitted in the State's case-in-chief." State's Bench Memorandum at 2, 3. The Court's position, the State asserts, would "gut the law that provides that the lesser offense is necessarily included and need not be charged." *Id.* at 5. For three reasons, the argument set forth in the State's memorandum is wrong and recklessly risks mistrial and special action.

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A CASCIO

1 First, the State's memorandum is a red herring, for the evidence at issue is *not* relevant to
2 a charge of negligent homicide. Evidence pertaining to prior sweat lodge ceremonies is irrelevant
3 to both reckless manslaughter and negligent homicide because, as this Court has repeatedly
4 explained, there is *no* evidence that any participant at a prior sweat lodge experienced *any* sort of
5 life-threatening condition. *See, e.g.*, Draft Trial Transcript, 3/25/11, at 60:21–25 (comment from
6 the Court that it would be “very misleading” to ask a witness whether he was warned about
7 alleged incidents at prior sweat lodge). Similarly, the evidence related to corporate risk
8 management principles is irrelevant to both negligent homicide and reckless manslaughter: the
9 State has still not identified a legal duty, has never connected the referenced risk management
10 practices to the deaths in this case, and—particularly in light of the testimony of former JRI
11 employee Melinda Martin—has no possible basis for attributing JRI's risk management practices
12 to Mr. Ray.

13 Second, even assuming the evidence in question was relevant to a negligent homicide
14 charge, the State's attempt to introduce entire bodies of evidence relevant *only* to negligent
15 homicide is fundamentally misguided and unconstitutional. A lesser included offense, by
16 definition, is one that “***requires no proof beyond that which is required for conviction of the***
17 ***greater.***” *E.g., Brown v. Ohio*, 432 U.S. 161, 168 (1977). That is why a conviction on a lesser
18 included offense does not offend Due Process. *See State v. Branch*, 108 Ariz. 351, 355 (Ariz.
19 1972). Accordingly, evidence that *is* relevant to reckless manslaughter is necessarily relevant to
20 negligent homicide, and the State is free to continue to introduce such evidence. But the State
21 cannot, consistent with Due Process, introduce entirely distinct (and highly prejudicial) bodies of
22 evidence that are *not relevant* to reckless manslaughter in an attempt to prove negligent homicide.
23 This conclusion is reinforced by the fact that the State can obtain a jury instruction on negligent
24 homicide *only* if negligent homicide is a *necessarily included offense* in the context of this case—
25 that is, if the evidence submitted in proof of reckless manslaughter could support a conviction of
26 negligent homicide. There is no precedent or legal basis for the State's backfilling attempt to
27 garner a negligent homicide conviction on a distinct body of evidence. To the contrary, this
28 approach is barred by Rule 403, because the evidence is highly prejudicial, and by the Due

1 Process Clause, because the State cannot allow a defendant to be convicted of a so-called lesser
2 included offense that is not subsumed within the proof of the greater offense.

3 Third, permitting the State to pursue an entirely distinct theory of the crime six weeks into
4 trial would violate Arizona Rules of Criminal Procedure and would be fundamentally unfair. The
5 motion deadline for issues related to the evidence from prior sweat lodges was December 27,
6 2010. The parties extensively and timely litigated the issue of prior sweat lodge evidence, and the
7 Court issued a well-reasoned ruling one month before trial. Mr. Ray prepared his defense,
8 presented an opening statement, and has examined twelve government witnesses, all in reliance
9 on the Court's ruling. To permit the State, through its endless onslaught of motions for
10 reconsideration, to now transform this into a misleading trial about prior years—prior years where
11 *no one faced any life-threatening illness or condition*—would violate rules 16.1(b), 16.1(c), and
12 16.1(d), would be fundamentally unfair, and would be reversible error subject to special action.

13 II. ARGUMENT

14 A. The evidence at issue is not relevant to a charge of negligent homicide.

15 The State's Bench Memorandum appears geared to two bodies of evidence that are not
16 relevant to the charged crime of reckless manslaughter: (1) evidence related to alleged incidents
17 at prior sweat lodge ceremonies, and (2) evidence related to JRI's corporate risk management
18 practices. The State's memorandum rests on the premise that this evidence, while not relevant to
19 reckless manslaughter, is relevant to a charge of negligent homicide. That is incorrect.

20 The evidence related to alleged incidents at prior sweat lodge ceremonies is not relevant to
21 a charge of negligent homicide for the same reasons that it is not relevant to a charge of reckless
22 manslaughter. *See* Defendant's Response to State's Motion for Reconsideration Re: MIL No.1,
23 2/22/11, at 3, 8–11. For starters, the State has not shown and cannot show that the alleged
24 symptoms at prior sweat lodges would signal—to Mr. Ray or to any reasonable person—a
25 substantial and unjustifiable risk that death would result. *See* Under Advisement Ruling on MIL
26 No. 1, 2/3/11 (holding that knowledge of the alleged pre-2009 symptoms “would not constitute
27 notice that [Mr. Ray] allegedly was subjecting these participants to a substantial and unjustifiable
28 risk of death”); *see also* Draft Trial Transcript, 3/25/11, at 49:1-6 (“apparently one person in 2005

1 went to the hospital with a none life threatening condition and . . . a bunch of questions implying
2 now there were similar situations in the past would not seem to properly characterize this”); *id.* at
3 60:21-25, 61:1 (“to suggest there was anything like . . . what happened . . . 2009 from . . . the
4 evidence I’ve [seen] would be very . . . misleading. One person went to the hospital over the
5 period of years with a non-life threatening condition”). Nor has the State proffered any evidence
6 that Mr. Ray knew of the alleged prior incident—a prerequisite to the State’s argument that a
7 reasonable person in Mr. Ray’s position in 2009 would have perceived a substantial and
8 unjustifiable risk that the decedents would die.

9 Likewise, the evidence related to issue of corporate risk management, and the proposed
10 testimony of Steven Pace, is irrelevant to a charge of negligent homicide. Chief among the
11 State’s continued failings in this regard are the lack of a legal duty upon which a crime of
12 omission could be based; the lack of any causal connection between the risk management
13 practices and the deaths that the State alleges Mr. Ray caused; and the absence of any connection
14 between Mr. Ray’s conduct and JRI’s corporate risk management practices. *See* Defendant’s
15 Motion for Case Management, 3/7/11; *see also* Defendant’s Motion to Exclude Testimony of
16 Steven Pace, 1/24/11.¹

17 **B. The State is not permitted to introduce evidence that is not relevant to the**
18 **charged crime of reckless manslaughter.**

19 The State is not, as it complains, “precluded” from “present[ing] relevant evidence
20 pertaining to the lesser-included” offense of negligent homicide. State’s Bench Memorandum at
21 5. To the contrary, *all* of the evidence the State continues to introduce that is relevant to reckless
22 manslaughter is, by definition, also relevant to negligent homicide. The State is free to introduce
23 this evidence. What the State cannot do is backfill its case with entire bodies of evidence that are
24 *not relevant to the charged crime of reckless manslaughter*. There is no legal precedent for the
25 State’s attempt. And it is prohibited by several independent rules.

26 ¹ In passing, the State mischaracterizes its burden of proof with respect to causation. It is not enough for
27 the State to prove, as it says in its memorandum, that the *sweat lodge* created a risk of death. The State
28 must also prove beyond a reasonable doubt that Mr. Ray himself *caused* the three deaths. To date, the
State has attempted to satisfy this causation requirement by arguing that Mr. Ray “conditioned”
participants to remain inside the sweat lodge. *See* State’s Response to Defendant’s Motion to Exclude
Audio of Spiritual Warrior Seminars, 2/28/11.

1 **1. The State's attempt fails because, by definition, a lesser included**
2 **offense must rely on the same proof submitted for the greater offense.**

3 First, the State's theory is at odds with the definition of a lesser included offense. It is
4 "invariably true of a greater and lesser included offense" that "the lesser offense . . . **requires no**
5 **proof beyond that which is required for conviction of the greater . . .**" *E.g., Brown v. Ohio*, 432
6 U.S. 161, 168 (1977).² This overlap is why the Due Process notice requirement is met by
7 conviction of a lesser offense: the "notice function" of the Due Process Clause "is satisfied if the
8 lesser offense of which a criminal defendant is found guilty is included within the greater crime
9 charged." *See State v. Branch*, 108 Ariz. 351, 355 (Ariz. 1972). "The test to determine whether
10 one offense is included within another is 'whether the first offense cannot be committed without
11 necessarily committing the second.'" *Id.*³ The evidentiary support for the two offenses, it bears
12 repeating, is by definition the same. *See, e.g., Com. v. Mobley*, 581 A.2d 949, 953 (Pa. 1990)
13 ("An offense is a 'lesser included offense' if the elements of the lesser offense are identical to and
14 are capable of being wholly subsumed within the elements of the greater offense *and the factual*
15 *predicate for the lesser included offense is part of the factual predicate required to establish the*
16 *greater offense.*" (emphasis added)). The operative concept—and the reason conviction of a
17 lesser included offense does not violate constitutional principles of notice and due process—is
18 that the lesser is subsumed within the greater offense.

19 To be sure, under this standard, "[t]he general rule is that negligent homicide is a lesser
20 included offense of manslaughter." *State v. Fisher*, 141 Ariz. 227, 247 (Ariz. 1984). But this
21 general rule is premised on the fact that "the *only* difference between manslaughter and negligent
22 homicide is an accused's mental state at the time of the incident." *Id.* (emphasis added); *see id.* at

23 ² That is why greater and lesser offenses are considered the "same" for constitutional purposes, viz, of
24 double jeopardy. *State v. Price*, 218 Ariz. 311, 313 (App. 2008).

25 ³ In other words, a lesser included offense "must be composed solely of some but not all of the elements of
26 the greater crime so that *it is impossible to have committed the crime charged without having committed*
27 *the lesser one.*" *State v. Celaya*, 135 Ariz. 248, 251 (1983) (citing *State v. Malloy*, 131 Ariz. 125, 639
28 P.2d 315 (1981)). *See also State v. Dugan*, 125 Ariz. 194, 195 (1980) ("An offense is lesser included
when the greater offense cannot be committed without necessarily committing the lesser offense."); *State*
v. Wise, 137 Ariz. 477, 479 (App. 1983) ("The test to determine if an offense is a lesser included one is
whether the greater offense cannot be committed without necessarily committing the lesser."); *State v.*
Teran, 130 Ariz. 277, 279 (App. 1981) (same).

1 248 ("The element of the greater not found in the lesser is awareness of the risk."). Thus, in the
2 usual reckless manslaughter case, the prosecution introduces evidence that is relevant to reckless
3 manslaughter, and, if *that* evidence is deficient on the distinguishing element, an instruction on
4 negligent homicide may be available. As explained more below, the basis for the instruction
5 never lies in a different body of evidence, but rather in a shortcoming within the evidence that
6 proves the charged crime.

7 Here, the State apparently seeks to prove negligent homicide by relying on evidence *not*
8 relevant to reckless manslaughter. To wit, the State's theory of negligent homicide apparently
9 turns on alleged prior incidents or corporate omissions. Yet the State's theory of reckless
10 manslaughter is that Mr. Ray somehow deliberately conditioned Mr. Shore, Ms. Brown, and Ms.
11 Neuman to remain in the sweat lodge until the point of death. Setting aside that there is *no*
12 evidence supporting this theory of reckless manslaughter, it turns on evidence is entirely distinct
13 from the State's theories of negligent homicide. On these facts, it is *not* the case, as is required
14 for a lesser included offense, that "it is impossible to have committed the crime charged without
15 having committed the lesser one." *Celaya*, 135 Ariz. at 251. These theories of negligent homicide
16 are thus not lesser included offenses for purposes of the Due Process Clause.

17 **2. The State is not entitled to an instruction on negligent homicide unless**
18 **the evidence relevant to reckless manslaughter supports it.**

19 Moreover, the State's attempt is improper because it is not until the end of trial that the
20 court will determine whether a negligent homicide instruction is even warranted. In making that
21 determination, the court will not only consider whether negligent homicide is a lesser included
22 offense as described above, but will also address a second, independent requirement—that
23 negligent homicide constitute a "necessarily included offense." That requirement turns on
24 whether the evidence offered by the State in support of the *charged crime* (reckless manslaughter)
25 could sustain a jury finding of negligent homicide. As the Arizona Supreme Court has repeatedly
26 explained,

27 Although the terms are often used interchangeably, a "lesser
28 included" offense is not always a "necessarily included" offense for
purposes of Rule 23.3. *State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d
771, 772 (1980). An offense is "lesser included" when the "greater

1 offense cannot be committed without necessarily committing the
2 lesser offense.” *Id.* But an offense is “necessarily included,” and so
3 requires that a jury instruction be given, only when it is lesser
included *and* the evidence is sufficient to support giving the
instruction. *Id.*

4 *State v. Wall*, 212 Ariz. 1, 3, (Ariz. 2006) (emphasis in original). This additional
5 requirement flows directly from the Constitution: “[D]ue process requires that a lesser included
6 offense instruction be given *only* when the evidence warrants such an instruction.” *Hopper v.*
7 *Evans*, 456 U.S. 605, 611 (1982) (emphasis in original).

8 In conducting the necessarily-included-offense inquiry, it is *always* the case that the Court
9 examines only one body of evidence: that which has been admitted as relevant to the charged,
10 greater offense. In particular, the court must conclude that “(1) the offense is a lesser included
11 offense of the one with which he or she is charged and (2) *based on the evidence presented at*
12 *trial*, the jury could rationally find that the state failed to prove an element of the greater that
13 distinguishes it from the lesser.” *Fisher*, 141 Ariz. at 247 (emphasis added); *see also Dugan*, 125
14 Ariz. at 195 (“The determination which must be made before the lesser included instruction is
15 proper is whether on the evidence the jury could rationally find that the state failed to prove an
16 element of the greater offense.”). The answer is yes only if, based on that body of evidence, “the
17 jury could rationally find that the state failed to prove an element of the greater offense” — the
18 element that “necessarily distinguishes the greater from the lesser.” *Dugan*, 125 Ariz. at 195–96.
19 In other words, an instruction on the lesser offense is contingent on a shortcoming in the
20 prosecution’s evidence in support of the greater offense—never on findings in a separate body of
21 evidence.

22 **3. Rule 403 and the Due Process Clause bar the State’s attempt.**

23 The Court need not decide this question in the abstract. Here, the evidence the State seeks
24 to introduce is so disconnected from the charged crime, so voluminous, so misleading, and so
25 prejudicial to the Defense that Rule 403 and the Due Process Clause impose a clear bar. *See*
26 Defendant’s Response to State’s Motion for Reconsideration, filed 2/22/11, at 6–7. The Court’s
27 ruling excluding this evidence remains correct.

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1 his event without giving them good information, if you will, information about the [dangers] of
2 his activities.”).

3 But the State was required to raise *all* of its arguments related to the prior sweat lodge
4 evidence prior to trial. The arguments are thus long precluded: “[a]ny motion, defense, objection,
5 or request not timely raised under Rule 16.1(b) ***shall be precluded***, unless the basis therefor was
6 not then known, and by the exercise of reasonable diligence could not then have been known, and
7 the party raises it promptly upon learning of it.” *Id.* 16.1(c). The State has had over a year to
8 fashion its arguments, and there is no legal justification for its choice to now litigate these issues
9 during trial.

10 Arizona courts take seriously the restrictions set forth in Rule 16, which are designed to
11 protect the interests of orderly procedure, finality, and notice of the issues to be addressed at trial.
12 Courts routinely reject motions and requests made after the deadline. *See, e.g., State v. Guytan*,
13 192 Ariz. 514 (1998) (prosecutor’s motion to amend indictment, filed more than one week after
14 the trial had begun, to allege gang motivation for purpose of sentence enhancement, was
15 untimely, and untimely filing was not justified, where prosecutor had previously known that there
16 were gang overtones to case); *City of Tucson v. Arndt*, 125 Ariz. 607, 609 (where prosecutor’s
17 motion for leave to amend charging document to add allegation of prior conviction was filed one
18 day late based on 20-days-before-trial computation, “untimeliness was a proper basis” for the
19 court’s denial of the motion); *State v. Stoglin*, 116 Ariz. 90, 94 (under Rule 16.1(c), prosecutor
20 waived objection to defense evidence known to prosecutor prior to trial by failing to timely and
21 properly raise it). *See also State v. Lee*, 25 Ariz. App. 220, 223 (App. 1975) (noting that the
22 requirement of timely motions serves the goal of “the reduction of unnecessary and repetitious
23 hearings and trials”).

24 Moreover, adherence to Rule 16.1(b) and (c) is intertwined with a criminal defendant’s
25 constitutional rights to Due Process a fair trial. As the United States Supreme Court has
26 explained, “[i]n a variety of contexts, our cases have repeatedly emphasized the importance of
27 giving the parties sufficient notice to enable them to identify the issues on which a decision may
28 turn.” *Lankford v. Idaho*, 500 U.S. 110, 126 (1991); *see id.* (“Notice of issues to be resolved by

1 the adversary process is a fundamental characteristic of fair procedure.”). In the context of this
2 case, Mr. Ray is entitled to meaningful notice of the boundaries of this case, and of the
3 evidentiary rulings that will govern the trial, at a time when he can prepare his defense
4 accordingly. Moreover, Mr. Ray is entitled to an orderly trial in which this Court’s rulings have
5 meaning and are respected. The State’s relentless attempts to introduce evidence that has been
6 ruled inadmissible, all without showing the good cause that Rule 16.1(d) requires, and its far-too-
7 late attempts to devise new theories of admissibility that should have been raised prior to trial, are
8 improper and unfair.

9 A criminal trial is not a free-for-all. This Court must serve its constitutionally mandated
10 role of gatekeeper of evidence and arbiter of procedural and evidentiary rules, and should
11 proscribe the State’s drumbeat of both explicit and back-door reconsideration efforts. Failure to
12 restrain the State’s relentless attack on this Court’s prior rulings raises a very substantial risk of
13 mistrial and special action.

14 **III. CONCLUSION**

15 The State’s belated and misleading attempt to introduce evidence that is not relevant to the
16 reckless manslaughter charge on the theory that it is relevant to negligent homicide must fail. The
17 evidence is *not* relevant to a negligent homicide charge; the doctrine of lesser included offenses
18 does not permit the prosecution to introduce evidence that is not also relevant to the charged,
19 greater offense; and Rule 16.1 and the constitutional requirements of Due Process and a fair trial
20 forbid the State’s relentless and belated attempts to alter the basis of this trial. The Court should
21 restrain the State’s reckless attempts to drive this case into mistrial and special action.

1 DATED: March 28, 2011

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9 Copy of the foregoing delivered this 28 day
of March, 2011, to:

10 Sheila Polk
11 Yavapai County Attorney
12 Prescott, Arizona 86301

13 by 

<p>45</p> <p>1 been problems in the past and it goes to Mr Ray's</p> <p>2 level of knowledge They are repeatedly suggesting</p> <p>3 to the jury that Mr Ray himself is in this and for</p> <p>4 the first time experiencing what's going on when</p> <p>5 that is simply untrue They've opened the door on</p> <p>6 other he shall use I abide by the courts rules</p> <p>7 and the issue was yesterday it related to the 9-1-1</p> <p>8 call and the conversation with Amayra Hamilton I</p> <p>9 believe the jury was left with a false impression</p> <p>10 over that issue but that's done with but now again</p> <p>11 we have a witness who Mr Kelly says to him didn't</p> <p>12 Mr Ray give you a fair presentation of what would</p> <p>13 happen in that sweat lodge We know that Mr Ray</p> <p>14 knowingly did not give them a fair presentation of</p> <p>15 what would happen He did not tell participants</p> <p>16 about problems in the past and that has been his</p> <p>17 pattern He /PWUR /REUZ the problems from the past</p> <p>18 and he continues to gather collect large sums of</p> <p>19 money from participants to come to his events</p> <p>20 without giving them good information ^ full ^ if</p> <p>21 you will information about the Dan /SKWRERZ of his</p> <p>22 activities The second area that Mr Kelly has now</p> <p>23 police lead the jury and it goes specific /HROEU to</p> <p>24 this issue of causation and Mr Ray's knowledge of</p> <p>25 these problems is the statement to this witness</p>	<p>47</p> <p>1 fair presentation when the defense nose that</p> <p>2 Mr Ray's knowledge of what can go wrong in that</p> <p>3 sweat lodge is vast and that it covers a period of</p> <p>4 time from 2005 forward with many things going</p> <p>5 wrong What I would like to do with this witness</p> <p>6 and pursue a line of questioning to find out</p> <p>7 whether or not Mr Ray fully and fairly gave them a</p> <p>8 good description of what would happen in that sweat</p> <p>9 lodge and specifically ask this witness ultimately,</p> <p>10 did Mr Ray tell you that in the past people had</p> <p>11 been rendered unconscious People had suffered</p> <p>12 convulsions People had become combative and</p> <p>13 people had become delinious</p> <p>14 THE COURT Please have a seat Ms Polk</p> <p>15 Mr Kelly before I hear your response I'm going to</p> <p>16 say a couple things Please have a seat Mr Kelly</p> <p>17 MR KELLY Sorry</p> <p>18 THE COURT Ms Polk preface I-G this with the</p> <p>19 ruling yesterday is should of some concern I did</p> <p>20 indicate at bench that was a 403 determination I</p> <p>21 had to think back to the 404(b) hearing in</p> <p>22 /TPHOFPL Recalling that testimony and that whole</p> <p>23 incident and the 2005 sweat lodge and what</p> <p>24 transpired after that with the /A /POLGZ for</p> <p>25 example changing the procedure and some how going</p>
<p>46</p> <p>1 that in the dining hall --</p> <p>2 MR KELLY Your Honor can we address them</p> <p>3 separately</p> <p>4 MS POLK I believe they're related Your</p> <p>5 Honor</p> <p>6 THE COURT Go ahead</p> <p>7 MS POLK The slate to this witness didn't</p> <p>8 you hear an he am is or a detective say it's or</p> <p>9 /O*GZ organo-phosphates you all need to get checked</p> <p>10 /OUFPLT there is two problems with that One is</p> <p>11 that that's clearly hearsay The transcript that</p> <p>12 Mr Li used in his opening shows an unknown</p> <p>13 ^ mail ^ male to this day nobody nose who that</p> <p>14 unknown ^ mail ^ male was And the statement that</p> <p>15 was in the transcript and the audio used in the</p> <p>16 opening is not something saying it's</p> <p>17 organo-phosphates you need to go get checked out</p> <p>18 I raised that and I believe the two are related</p> <p>19 because again two things are going on A</p> <p>20 misleading presentation to the jury and a</p> <p>21 misleading presentation about Mr Ray's level of</p> <p>22 knowledge about the hazardous nature of his sweat</p> <p>23 lodge And suggesting to this witness that Mr Ray</p> <p>24 gave them a fair presentation suggests to the jury</p> <p>25 that this is all Mr Ray nose That he gave them a</p>	<p>48</p> <p>1 into that whole thing as a side trial and how it</p> <p>2 might have impacted what this witness might have</p> <p>3 said, which no one was really sure So that is a</p> <p>4 very different situation At the same time a</p> <p>5 difficult question because there was an element of</p> <p>6 opening the door But it was a 403 determination</p> <p>7 ultimately</p> <p>8 With regard to this situation, my</p> <p>9 question to you is all of these things that were</p> <p>10 observed by this witness, Mr Barrett, he's /A</p> <p>11 /PAERPBT Li saying that he was warned what it would</p> <p>12 be like Why would it take reference to prior</p> <p>13 events to do that Redirect is appropriate on that</p> <p>14 alone So that was my question to you Ms Polk</p> <p>15 If you could address that Why would you have to</p> <p>16 go back when there are a number of things that he</p> <p>17 saw or he's testified to that happened, why would</p> <p>18 you have to go back and pull from prior events when</p> <p>19 as you know from the 404(b) over six seven events</p> <p>20 or whatever there was one person who went to a</p> <p>21 doctor, and then it's back to the whole situation</p> <p>22 of some how portraying through your questions that</p> <p>23 there were similar situations when in fact there</p> <p>24 was no similar situation to what happened in</p> <p>25 October of 2009 At least that was the</p>

<p style="text-align: right;">49</p> <p>1 determination at the 404(b) There was -- and no</p> <p>2 one has apparently one person in 2005 went to the</p> <p>3 hospital with a none life threatening condition and</p> <p>4 to /EP up a bunch of questions implying now there</p> <p>5 were similar situations in the past would not seem</p> <p>6 to properly characterize this Those are my</p> <p>7 initial concerns before I hear from Mr Kelly</p> <p>8 MS POLK: Your Honor because it goes to the</p> <p>9 defendants level of knowledge with this witness I</p> <p>10 can ask him were you warned that you might suffer</p> <p>11 convulsions Were you warned that you might go</p> <p>12 into shock Were you warned that participants</p> <p>13 might become combat Tim</p> <p>14 Q Well, okay go ahead?</p> <p>15 MS POLK And his answers I believe are going</p> <p>16 to be no The problem is what is left unanswered</p> <p>17 is that Mr Ray nose that these event have occurred</p> <p>18 in the past So it still doesn't answer for the</p> <p>19 jury Mr Ray's level of knowledge All it suggests</p> <p>20 then is that Mr Ray didn't know that that could</p> <p>21 happen either and what we know the truth is that</p> <p>22 Mr Ray knew all those things could happen they had</p> <p>23 happened in past events So this line of</p> <p>24 questioning goes to Mr Ray's level of knowledge</p> <p>25 about what could happen in the sweat lodge in 2009</p>	<p style="text-align: right;">51</p> <p>1 been crucial for these witnesses these participants</p> <p>2 to know They weren't told that it there had been</p> <p>3 problems in the past /-PLT where people suffered</p> <p>4 could not /SHUL /SRUPBS /TKHREUR /KWRUPL became</p> <p>5 combative /ROFT consciousness and were not, did</p> <p>6 not receive medical attention and then on another</p> <p>7 occasion lost consciousness or became combative and</p> <p>8 did seek Again it goes to Mr Ray's level of</p> <p>9 knowledge The jury will be left with the</p> <p>10 impression that nobody knew that this could happen</p> <p>11 This is a sweat lodge gone wrong for the first time</p> <p>12 and that Mr Ray along with these participants</p> <p>13 everybody is just surprised by it That's not</p> <p>14 true Mr Ray's level of knowledge is that things</p> <p>15 can go horribly wrong and he does not fairly warn</p> <p>16 these participants how bad things can be and that</p> <p>17 he's had problems in the past</p> <p>18 THE COURT Ms Polk isn't it the case that a</p> <p>19 lot of these people were at prior sweat lodges We</p> <p>20 know at least one person</p> <p>21 MS POLK Not that we've heard from so far</p> <p>22 Ms Hayley is the only witness Ms Hayley is the</p> <p>23 only witness who was at a prior event and as the</p> <p>24 jury heard, she said I'm not going back in there</p> <p>25 She elected not to go back in there But the jury</p>
<p style="text-align: right;">50</p> <p>1 is failure to adequately warn the /PAEURT /-D</p> <p>2 before they go in It's failure to adequately warn</p> <p>3 them of the hazard that they ultimately did</p> <p>4 encounter His suggestion to them that was safe to</p> <p>5 push through, but it doesn't explain to the jury</p> <p>6 that in fact Mr Ray nose that much worse things</p> <p>7 can happen because they did in fact happen</p> <p>8 /STKPWHR-FPLT much /PWORS things than what</p> <p>9 MS. POLK Than what Mr Ray told them would</p> <p>10 happen in the briefing</p> <p>11 THE COURT Didn't that become at least</p> <p>12 arguably apparent just from what happened in 2009</p> <p>13 Why would it take any reference to prior events</p> <p>14 MS POLK It goes to Mr Ray's level of</p> <p>15 knowledge Mr Kelly specifically asked this</p> <p>16 witness weren't you given a fair warning about what</p> <p>17 would happen in the sweat lodge We're</p> <p>18 ^ aloud ^ allowed then to explore, well were you</p> <p>19 given a fair warning or not and they weren't given</p> <p>20 a fair warning They weren't given a fair warning</p> <p>21 They weren't told that people would be left</p> <p>22 unconscious for many, many rounds They weren't</p> <p>23 told about the shock the could not /SHUL /SHRUPBS</p> <p>24 the combative necessary the /TKHREUR /KWRUPL and</p> <p>25 ultimately what they weren't told, which would have</p>	<p style="text-align: right;">52</p> <p>1 doesn't know why because she hasn't been</p> <p>2 ^ aloud ^ allowed</p> <p>3 THE COURT No, I think she mentioned</p> <p>4 Ms Hayley went to quite a bit of detail why why</p> <p>5 she /TK-PBTD want to go in there because of what</p> <p>6 she'd is seen in /TWOUPF I believe it was</p> <p>7 MS POLK Yes I stand corrected She did</p> <p>8 get to testify But what the jury hasn't heard is</p> <p>9 that Mr Ray nose there have been many other</p> <p>10 problems other than what Ms Hayley testified</p> <p>11 about So again, it goes to his level of knowledge</p> <p>12 what he knew, what he chose to tell participants</p> <p>13 and did he fairly warn them about what could happen</p> <p>14 and he did not And if the door has been opened</p> <p>15 because Mr Kelly has said didn't Mr Ray give you</p> <p>16 a fair description and didn't he fairly warn you</p> <p>17 about what would happen and we know he didn't give</p> <p>18 them a fair description and we know he absolutely</p> <p>19 did not warn participants about what could happen</p> <p>20 THE COURT Thank you Mr Kelly</p> <p>21 MR KELLY Judge, /TPHEUS /POEBGZ been</p> <p>22 talking here for 20 minutes What is the question?</p> <p>23 THE COURT The question is going into what</p> <p>24 happened at prior events and then of course that</p> <p>25 would have to also be a case of perhaps -- that's</p>

<p>57</p> <p>1 THE COURT Ms Polk where do you think that</p> <p>2 statement came from You said it was an unknown</p> <p>3 ^ mail ^ male Didn't it come from somebody one of</p> <p>4 the respond /ERZ isn't that the states belief</p> <p>5 MS. POLK I don't know where it came from</p> <p>6 Your Honor The transcript says unknown</p> <p>7 ^ mail ^ male</p> <p>8 MR KELLY Judge dawn foster last week said</p> <p>9 it was an he am is</p> <p>10 THE COURT I don't want interrupt /GS I</p> <p>11 give people an opportunity to respond Ms Polk</p> <p>12 MS POLK Your Honor I don't know who said</p> <p>13 it I know that the /HRAUPLTS does not know who</p> <p>14 said it We don't believe and I'm looking at</p> <p>15 Detective Diskin because I don't want to mislead</p> <p>16 the court but we don't know of any law enforcement</p> <p>17 person that said it, is that correct</p> <p>18 THE COURT Mr Kelly just on that Mr Li</p> <p>19 What the the indication it came from an authority</p> <p>20 first respond /ER type authority</p> <p>21 MR LI I'll give you two pieces of</p> <p>22 information since I handled this particular issue</p> <p>23 The first is what this is This is sort of between</p> <p>24 various interviews I think it's Michael bar</p> <p>25 /PWERZ interview Mr Bar /PWER is being</p>	<p>59</p> <p>1 ambulance personnel something like this This is</p> <p>2 actually the states evidence The second piece of</p> <p>3 evidence that we have that supports that this is an</p> <p>4 he am it who is saying this and that this happened</p> <p>5 despite the fact the state is now we have no idea</p> <p>6 what this is this could have been anybody offer the</p> <p>7 street The other fact is that I sat in eye room</p> <p>8 with Mr Hughes and a witness about a week and a</p> <p>9 half ago a woman which the name of dawn Gordon</p> <p>10 ^ who is ^ whose on the prosecution witness</p> <p>11 ^ list ^ lift and I took 10 minutes with her,</p> <p>12 because she was at the interview and she's</p> <p>13 ^ lifted ^ listed as somebody who was in the dining</p> <p>14 hall I played it for her Did you hear something</p> <p>15 like this and she said yes, I did Now I would be</p> <p>16 very interested to see if the state is actually</p> <p>17 still going to call her, okay But it is not</p> <p>18 factually correct that the state has no idea where</p> <p>19 this tape came from or who might have been talking</p> <p>20 You only have to look at it and listen to it to</p> <p>21 understand that when somebody says we'll come back</p> <p>22 I think you can draw a fair inference that that's</p> <p>23 an he am it or ambulance driver because he's saying</p> <p>24 /TPHEB gets worse either go to the hospital or call</p> <p>25 nine one /KWUPB and we'll come back I think it's</p>
<p>58</p> <p>1 interviewed by a detective The detective's tin</p> <p>2 /TER view is interrupted by this person who comes</p> <p>3 in I've got it cued up He says all right</p> <p>4 everybody, I mean, if you want to listen to it</p> <p>5 THE COURT I recall something of that My</p> <p>6 only question is you have a reason to believe it</p> <p>7 came from authority an he am is he am it or first</p> <p>8 responder fire official</p> <p>9 THE WITNESS /HR*EUR I have two reasons one</p> <p>10 is circumstantial evidence One is just the guy</p> <p>11 comes in and says that we're checking into that</p> <p>12 We're not exactly sure, could have been some</p> <p>13 /KROPLS with maybe some /O*GZ that were /O*GZ that</p> <p>14 were mixed in some how We're cheek /-G an unknown</p> <p>15 fee /AEUL /SPHA some a female says what sort of</p> <p>16 /SEUPL /SOPLZ and the response is nausea vomiting</p> <p>17 headaches everything you have, if it doesn't get</p> <p>18 better The good news is that the patient that are</p> <p>19 there they're coming in already improving just keep</p> <p>20 an eye on that and on each other if anybody gets</p> <p>21 worse, either go to the hospital or call 9-1-1 and</p> <p>22 we'll come back Okay We'll come back So I</p> <p>23 don't have a videotape of this person speaking, but</p> <p>24 we'll come back suggests very strong think that the</p> <p>25 person that's discussing this is an he am it</p>	<p>60</p> <p>1 a fair /EUP /TPREPBS to /KRAU draw I think it's</p> <p>2 also a fair inference to draw from the /TPAPBGT the</p> <p>3 knowledge with which which this person is speaking</p> <p>4 They are symptoms of organo-phosphates nausea</p> <p>5 vomiting headache Everything these people had I</p> <p>6 think you can draw a fair inference from that that</p> <p>7 it's an he am it personnel</p> <p>8 THE COURT Mr Li you've covered this</p> <p>9 MR LI Thank you</p> <p>10 THE COURT. I don't find anything improper</p> <p>11 just in open question Again it didn't have</p> <p>12 anything to do with the truth of that It had to</p> <p>13 do with were people following LEDs in the early</p> <p>14 going and how wide spread was this notion were</p> <p>15 people being told I don't want to go into why it</p> <p>16 might be more or less relevant That's what that</p> <p>17 question was about We don't need to discuss I</p> <p>18 don't find anything improper about that question</p> <p>19 The the other issue is much more difficult and</p> <p>20 Ms Polk, here's the problem The asking question</p> <p>21 Are going to suggest there was anything like /A</p> <p>22 what happened in /TWOEPB from the 2009 from /-D the</p> <p>23 /-D the evidence I've sign would be very list</p> <p>24 misleading One person went to the hospital over</p> <p>25 the period of years with a none life threatening</p>

<p>61</p> <p>1 condition The other problem is the 404(b) 2 testimony was on a whole different standard of 3 proof I found clear and convincing that certain 4 instances happened They were relatively isolated 5 There wasn't a lot of specificity Any incidents 6 that become the subject of testimony would have to 7 also include knowledge by Mr Ray So to go into 8 that with this witness and suggest there might be 9 just multiple people out there that Mr Ray knew 10 about everybody that would be -- I don't see the 11 /SPWAEUS basis for that There might be a way, 12 well, I don't wanted to go further I told you the 13 concern And I'm back to my initial yes is, you 14 can ask on redirect why he thinks it was proper 15 warning when he's taking people out and doing these 16 things That was the testimony He thinks he was 17 properly warned that this could happen apparently 18 And you can certainly redirect into that area But 19 to just get back into these other sweat lodge 20 events I'm not going to repeat myself on that 21 Ms Polk anything else 22 MS POLK Your Honor, not on that issue But 23 the state does have another issue 24 MR HUGHES Your Honor with respect to the to 25 the next witness There are a couple issues</p>	<p>63</p> <p>1 /STKPWHR*RPBLGTS Ms Do 2 MS DO Thank you, Your Honor Well, with 3 respect to the lawsuit against Angel Valley the 4 state did provide me with a copy of that this 5 morning At this point I don't anticipate a need 6 to use this or reference the lawsuit against Angel 7 Valley in my cross-examination But without having 8 heard the direct I can't say that with any degree 9 of certainty I can just say I don't anticipate 10 using unless something is opened up on direct 11 With respect to Mr /RO anyone's lawsuit against 12 James Ray international Again I do not intend to 13 offer any evidence /FPT at there point I don't 14 even even in /STEPBD to /KREFR /REPBS that in 15 cross-examination unless something is gone into in 16 direct With regard to the media exposure, 17 Mr Hughes did give me notice yesterday that this 18 witness received from the state pursuant to the 19 courts order on February 28 2011 that witnesses 20 were not to review any media coverage under the 21 rule of exclusion it appears this witness Mr /RO 22 Ronin actually after receiving that notice and a 23 copy of the courts order went on line and watched 24 the video coverage of Jennifer Haley Laura Tucker 25 Melissa Phillips Also went on line and reviewed</p>
<p>62</p> <p>1 Mr Ronin One is yesterday afternoon when I met 2 with him he informed me that he had some exposure 3 to watching some of the testimony in this case on 4 the media So I don't know how we can address that 5 ordeal with that But I wanted to put that on the 6 table The other issue, which is kind of a two 7 part is when I spoke with him, he did inform me 8 that there was a, he had filed lawsuits against 9 Angel Valley and against Mr Ray I have asked the 10 /TKPEPBS for a copy of any documents that they 11 intend to use today in /KROGS examining as of yet I 12 don't have any I would /SKW again that anything 13 they intend to use be provided to us before we 14 /TKPWEUP our direct examination The second issue, 15 which is pertaining specifically to the Angel 16 Valley lawsuit, we were able to find that We were 17 not able to find the lawsuit against Mr Ray I 18 don't know if the /TKPEPBS intend to use that or 19 not I gave them a copy this morning and asked if 20 they had a copy already I don't think I've gotten 21 an answer yet as to whether the defense team had a 22 copy of the Angel Valley lawsuit If they're not 23 intending to use it it's a moot issue If they are 24 intending to use it I would bring that up 25 MR KELLY Your Honor I believe it's Ms Do</p>	<p>64</p> <p>1 opinions and editor /KWRALZ about this case Also 2 went on line and read and reviewed summaries of 3 witness testimony I don't know what the court 4 intend to do with that. I don't know what 5 recommend /TKUEUZ are available I do intend to 6 cross-examine on that issue because obviously it 7 goes to the witnesses taint or buys or you know, 8 the accuracy of his own perception and 9 recollection 10 MR HUGHES Your Honor, I agree That's a 11 fair area for them to examine I'll ask him 12 questions about that He indicated he thought for 13 some reason he wasn't on our witness ^ list ^ lift 14 despite receiving the notification from us I 15 believe that's a fair area for the defense and for 16 myself to inquire into With respect to the 17 lawsuits against Mr Ray, which the witness didn't 18 really want to talk to me about because there is a 19 confidentiality agreement between him and Mr Ray 20 He did indicate enough that led me to believe it 21 had been settled against Mr Ray and not against 22 Angel Valley The defense isn't going to go into 23 those areas I /WOEPT go into them if they are, I 24 think I need to have a copy of that lawsuit against 25 Mr Ray</p>

<p>9</p> <p>1 pretrial matters</p> <p>2 MS POLK Yes, Your Honor just a couple</p> <p>3 MR LI Thank you Your Honor /A /SA oh</p> <p>4 THE COURT We're on the record with State of</p> <p>5 Arizona versus James Arthur Ray present with his</p> <p>6 attorney Mr Li Mr</p> <p>7 MR KELLY Li Ms Do /STAETS represented by</p> <p>8 Ms Polk Mr Hughes This is the time to discuss</p> <p>9 some pretrial matters Counsel</p> <p>10 MS POLK Good morning Your Honor, thank you</p> <p>11 The state is renewing the request, the motion to</p> <p>12 reconsider the ad ^ Miss ^ miss built of the 404(b)</p> <p>13 acts for the following reasons Your Honor The</p> <p>14 state believes that Mr Li in his opening has</p> <p>15 clearly opened the door for this information to</p> <p>16 come in When Mr Li was addressing the jury for</p> <p>17 many, many minutes on end he talked to the jury</p> <p>18 suggested to the jury that the state had ignored</p> <p>19 other possible causes of death, said that the state</p> <p>20 had ignored the possibilities of poisoning from</p> <p>21 /KEPL chemicals from product that were used to</p> <p>22 construct the sweat lodge such as the tarp, he</p> <p>23 suggested that the state had ignored the</p> <p>24 possibilities of soil from inside the sweat lodge</p> <p>25 as a source of toxins that caused the death the</p>	<p>11</p> <p>1 that Mr Li through up on the screen was in fact</p> <p>2 photograph from 2008, the construction of the sweat</p> <p>3 lodge then. Mr Li also through up on the screen</p> <p>4 for the jury to see two photographs that were from</p> <p>5 a 2009 sweat lodge ceremony that occurred in June</p> <p>6 The photograph that showed the completed sweat</p> <p>7 lodge that showed sleeping bags around the</p> <p>8 entrance, that photograph was of a ceremony that</p> <p>9 occurred in June of 2009 Again, the sweat lodge</p> <p>10 that was used by Mr Ray in October is that same</p> <p>11 sweat lodge, but that photograph was of the</p> <p>12 June 2009 sweat lodge used by somebody else And</p> <p>13 then /TPAOEPBL Li he finally he through up a</p> <p>14 photograph of a 2009, the interior of the sweat</p> <p>15 lodge, again from this ceremony that occurred in</p> <p>16 June of 2009 And it showed the interior of a</p> <p>17 sweat lodge, again that is the sweat lodge used by</p> <p>18 Mr Ray, but that photograph was taken in June</p> <p>19 of 2009 in connection with a sweat lodge ceremony</p> <p>20 conducted by somebody unrelated to Mr Ray at the</p> <p>21 premises of Angel Valley What the defense nose</p> <p>22 what Mr Li nose is during the 4 months between</p> <p>23 October of 2009 and February of 2010 when the Grand</p> <p>24 Jury indicted Mr Ray, the state embarked on a</p> <p>25 very, very thorough investigation to determine what</p>
<p>10</p> <p>1 /FP That the state had ignored wood that /WAUS</p> <p>2 used in the fire to heat the rocks as a possible</p> <p>3 cause of the or source of the cause of death and he</p> <p>4 told the /SKWR-R I that the state had disregarded</p> <p>5 initial concerns by the emergency room physician</p> <p>6 and paramedics that there were other explanations</p> <p>7 for the cause of death such as toxins and such as</p> <p>8 carbon Monday objection I'd poisoning Repeatedly</p> <p>9 Mr Li said to this jury, ask yourself these</p> <p>10 questions when you hear this /KWAEUS, repeatedly</p> <p>11 Mr Li said to this jury wouldn't you want to know</p> <p>12 if you were investigating this case whether it was</p> <p>13 toxins that caused the /TAEGT Whether it was</p> <p>14 carbon Monday objection side when it was chemical</p> <p>15 poison Repeatedly Mr Li said to this jury what</p> <p>16 would you want to know Again referring in</p> <p>17 his words possible explanations for the cause of</p> <p>18 death Also during Mr Li's opening he showed the</p> <p>19 jury a photograph of the construction of a sweat</p> <p>20 lodge That was not a photograph from 2009</p> <p>21 Mr Ray's sweat lodge That was a photograph of</p> <p>22 the construction of the sweat lodge in 2008 I</p> <p>23 have no problem with showing that photograph to the</p> <p>24 /SKWR-R I jury because the sweat lodge that was</p> <p>25 used in 2008 was used in 2009, but the photograph</p>	<p>12</p> <p>1 happened there and what the cause of death was</p> <p>2 What emerged during that investigation was a body</p> <p>3 of evidence that ^ established ^ accomplished a</p> <p>4 pattern, and that pattern is that only time the</p> <p>5 The /OPL time participants in Angel Valley got</p> <p>6 sick was when Mr Ray was conducting a sweat lodge</p> <p>7 ceremony That pattern also showed that the only</p> <p>8 time participants got sick during Mr Ray's sweat</p> <p>9 lodges ceremony was when he was /RAFP /ET /-G up</p> <p>10 the heat What the court heard during the 404(b)</p> <p>11 hearing last November is that early on in 2003 and</p> <p>12 2004, Mr Ray conducted sweat lodge ceremonies at</p> <p>13 Angel Valley in different structures and complained</p> <p>14 that they were not hot enough and so the owners of</p> <p>15 an yell valley to accommodate him built different</p> <p>16 size structures and worked at making the structures</p> <p>17 hot /TER and hot /ER Finally in 2005 as the</p> <p>18 evidence showed at the 404(b) hearing there was a</p> <p>19 very hot sweat lodge ceremony conducted by Mr Ray</p> <p>20 with people getting very sick and that's where the</p> <p>21 evidence of Daniel Pfankuch, who got very sick came</p> <p>22 out screaming, was taken to the hospital and</p> <p>23 received medical attention was relevant And that</p> <p>24 was also relevant because testimony at that 404(b)</p> <p>25 hearing showed that Mr Ray specifically asked</p>